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The annual meeting of the Illinois State Bar Association, held in Springfield on January 23d, was successful both in point of attendance and interest manifested. The president, Oliver A. Harker, delivered the annual address embodying the fruits of his observations for many years as a practitioner and judge. Judge Henry W. Blodgett read an interesting paper giving his reminiscences of the early Cook county bar. Judge James H. Cartwright discussed "The Art of Brief Making." Assistant Attorney-General Martin L. Newell, the law writer and editor of the appellate court reports, discussed "The Art of Writing Law Books." Hon. James C. Courtney, of Metropolis, read an interesting paper on "The Unwisdom of the Common Law." One of the most entertaining papers was one by Judge James H. Cartwright on "The Briefs and Arguments that Help the Court." A special address by Myron H. Beach on "Some Peculiarities of the Law of Fire Insurance" is noteworthy, as being in the line of a practical review of some interesting questions and cases upon the subject of insurance.

The remarkable spectacle of a half dozen antagonistic receivers for different portions of the same railroad systems has been presented to those who, for the past few months, have watched the affairs of the Northern Pacific R. R. Co. The incident is without parallel in the history of railroad bankruptcies, and threatened to disrupt the property into a number of separate sections. Since the United States Court in the District of Washington asserted concurrent jurisdiction in the foreclosure and receivership with the court of the Wisconsin district, and proceeded to appoint its own receivers for the part of the road within its district (the example being followed by other district judges), progress in relation to the plan of reorganization has been totally arrested. The situation became so grave and the conflict of authority between the different local courts of the United States of so serious a nature that the matter was taken to the United States Supreme Court, which tribunal was asked to recommend to the judges of the various circuits through which the road runs, that some one court be designated as having primary jurisdiction. In behalf of the application the argument was advanced that in consequence of the conflict of authority between the courts the road is practically threatened with dismemberment by the appointment of different receivers for every judicial circuit through which the road runs.

Fortunately the Supreme Court judges have just reached a prompt solution of the whole trouble. They have decided that the federal court for the District of Wisconsin, by which the receivers were originally appointed, and in which the foreclosure suit was started, has jurisdiction, and ought to be recognized as the court having primary cognizance of the matter. Following this is the declaration that the courts of other districts along the line, while protecting the rights of local creditors, should make their proceedings of an ancillary character and subordinate them to those of the court of primary jurisdiction.

It now seems that the appointees of the Wisconsin district judge will be recognized as sole receivers. The judges say, in references to the question presented, that they are of the opinion that "proceedings to foreclose a mortgage placed by a railroad company upon its lines extending through more than one district should, to the end that the mortgaged property may be effectively administered, be commenced in the circuit court of the district in which the principal operating offices are situated, and in which there is some material part of the railroad embraced by the mortgage; that such court should be the court of primary jurisdiction and of principal decree, and the administration of the property in the circuit courts of other districts should be ancillary thereto."

NOTES OF RECENT DECISIONS.

WILL—INHERITANCE BY ONE CAUSING THE DEATH OF TESTATOR.—The case of Ellerson v. Westcott, 42 N. E. Rep. 540, decided by the New York Court of Appeals, was an action for partition brought by the sister of a decedent, claiming that she and the other heirs at law were entitled to real estate of which her brother died seized. A paper pur-

porting to be a will was attacked in the complaint as originally drawn for alleged lack of testamentary capacity, fraud and undue influence, and because it was claimed that such will was void for uncertainty, and that its provisions offended against the statute of perpetuities. After issue had been joined, a motion to amend the complaint was made, setting up the fact that the wife of the decedent, who was a beneficiary under his alleged will and a party to the action, had caused his death, by poison or by other means, for the purpose of realizing the benefits given her by the will. Such motion was made, relying upon the doctrine advanced by the court of appeals in Riggs v. Palmer, 115 N. Y. 506, 29 Cent. L. J. 461, as establishing the proposition that where a legatee or devisee, under a will, to prevent a revocation or to anticipate the enjoyment of the benefit conferred, puts the testator to death, the felonious act makes the legacy or devise void. But the court did not think such contention was justified by the facts of this case. The case of Riggs v. Palmer was an action by an heir at law of a testator against a devisee and legatee who had murdered the testator to obtain the possession of the property given him by the will, to cancel the provisions for his benefit, and to have it adjudged that he was not entitled to take under the will, or to share, as distributee or otherwise, in the estate of the testator; and the relief was granted. But the court did not decide that the will was void. Riggs v. Palmer, the court says, is an authority that a court of equity will intervene and deprive her of the benefit of the devise. It will defeat the fraud by staying her hand and enjoining her from claiming under the will. But the devise took effect on the death of the testator, and transferred the legal title and right given her by the will. The relief which may be obtained against her is equitable and injunctive. The court, in a proper action, will, by forbidding the enforcement of a legal right, prevent her from enjoying the fruits of her iniquity. It will not and cannot set aside the will. That is valid, but it will act upon facts arising subsequent to its execution, and deprive her of the use of the property. It will be remembered that the doctrine of Riggs v. Palmer has been antagonized by a number of decisions since rendered in other States. See 39 Cent. L. J. 217, 41 Cent. L. J. 377.

CONTRACT BY NATIONAL BANK — ULTRA VIRES.—In Dresser v. Traders' National Bank, 42 N. E. Rep. 567, decided by the Supreme Judicial Court of Massachusetts it was held that under Rev. St. U. S., § 5136, cls. 3, 7, empowering a national bank to make contracts and to exercise all powers necessary to carry on the banking business, an agreement by a national bank to procure a person applications for insurance, if he would procure for it a customer, is *ultra vires*. It was further held that, in an action for breach of such a contract, the bank may set up the defense of *ultra vires*. The court said in part:

Two questions are then presented: First, whether a bank can agree to pay money to a third person for the purpose of securing a customer, and second, if it can do so, whether it can agree to furnish to such third person, for such a purpose, fire insurance to a specific amount. We should be slow in answering the first question in the affirmative. Such a mode of doing business is so inconsistent with sound principles of banking that it would seem that the directors would not be justified in thus spending the money of the stockholders. But it is unnecessary to decide this question, as we are of opinion that the second question must be answered in the negative. As we understand the declaration, the officers of the bank, acting in its behalf, were to go about, either personally or by an agent, seeking for persons who wished to insure their property, and, when they had found them, put the matter in the hands of the plaintiff, who would cause insurance to be made, and thus earn a commission. We are of the opinion that this would be so far outside the legitimate purposes for which national banks are organized that the contract declared on must be deemed to be *ultra vires* of the defendant corporations. Davis v. Railroad Co., 131 Mass. 258; Weckler v. Bank, 42 Md. 581; Norton v. Bank, 61 N. H. 589.

It is, however, contended by the plaintiff that it is settled by the decisions of the Supreme Court of the United States that if a national bank acts in excess of its powers, this can be taken advantage of only by the government, and not by a party to an action. See Gold Mining Co. v. National Bank, 96 U. S. 640; Bank v. Matthews, 98 U. S. 621; Bank v. Whitney, 103 U. S. 99; Fortier v. Bank, 112 U. S. 439, 5 Sup. Ct. Rep. 236. But these are cases where a national bank lent money in excess of its corporate powers, or where an action was brought on a note for which the bank had taken as collateral security something which, by law, it was not authorized to take, or where a bank sought to realize upon such security. In Bank v. Townsend, 139 U. S. 67, 76, 11 Sup. Ct. Rep. 496, Mr. Justice Harlan, speaking of Bank v. Matthews, which is the leading case on this subject, says: "The decision went upon these grounds: That the bank parted with its money in good faith; that the question as to the violation of its charter by taking title to real estate for purposes unauthorized by law could be raised only by the government, in a direct proceeding for that purpose; and that it was not open to the (original) plaintiff in that suit, who had contracted with the banks to raise any such questions in order to defeat the collection of the amount loaned." See, also, Thompson v. Bank, 146 U. S. 240, 13 Sup.

Ct. Rep. 66. Whether the plaintiff can maintain an action upon an implied contract to pay him the fair value of his services is not open on the pleadings before us, and has not been argued. We are not called upon, therefore, to decide whether the same rule which obtains where a corporation has received money or property under a contract which it is beyond its power to make, and which may be recovered back on an implied contract, applies to the case before us. See Davis v. Railroad Co., 131 Mass. 258, 275; L'Harbette v. Bank, 162 Mass. 137, 38 N. E. Rep. 368; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. Rep. 478; Norton v. Bank, 61 N. H. 589.

ACTIONS ON PENAL STATUTES.

What is a Penal Statute?—A penal statute is defined as one that inflicts a forfeiture or penalty for transgressing its provisions.[1] The statutes here considered will be those upon which recovery is to be had in civil actions—not statutes which impose a fine to be assessed in a criminal prosecution. Statutes which inflict a penalty to be recovered for the use of the public, in whole or in part, are obviously penal. But another class of statutes giving as remedies to parties aggrieved or affected by breaches of their provisions certain fixed sums to be recovered from any one violating such provisions, or imposing liabilities upon the violator of such provisions to be enforced by the party affected, have given rise to some discussion. It becomes important to ascertain the nature of such statutes for three reasons: First, because of the rule that actions upon penal statutes abate upon repeal of the statute; second, because of statutory provisions as to limitation of actions upon penal statutes; and, third, because of the rule that one State will not enforce the penal statutes of another State. A somewhat different rule appears to prevail in the latter case from that applied in the first two. The criterion generally adopted in the first two cases is this: Is the liability imposed by the statute as a punishment for its violation? If so, it is a penalty, and the statute is a penal statute, although it may give a remedy to the person injured at the same time. Where a statute creates a liability regardless of the amount or character of the damage and dependent solely upon the fact that its provisions have been violated, such statute is held penal as far as statutes of limitation or the effect of repealing statutes are concerned. This is clearly stated in Diversey v. Smith[2] (by Scholfield, J., at p. 384): "It is the effect and not the form of the statute that is to be considered, and when its object is clearly to inflict a punishment on a party for violating it—*i. e.*, doing what is prohibited or failing to do what was commanded to be done—it is penal in its character, and the circumstance that in punishing remedy is likewise afforded to those having an interest in the observance of the statute is unimportant."[3] This question has generally arisen in considering statutes imposing liability upon directors or stockholders in corporations for failure to comply with statutory requirements. Where double damages are imposed on railway companies for killing stock, or penalties are given to persons compelled to pay excessive fees to public officials, the nature of the statute would seem to be clear.[4]

Enforcement of Penal Statutes in Foreign Jurisdictions.—It is an established rule that the courts of one sovereignty will not execute the penal laws of another sovereignty, either directly or indirectly, in the form of judgments founded on such laws.[5] But for the purpose of this rule the word penal has a different meanirg from that given to it in other cases. The rule in question is one of international law, and in applying it the word penal must be taken, not in its ordinary acceptation, but in its "international sense." Within the meaning of this rule, a penal law is one imposing punishment for an offense committed against the State, and the test is whether the wrong sought to be redressed is a wrong to the public or to an individual. Accordingly, it is held that the rule applies only to prosecutions for crimes and misdemeanors and to suits by the State to recover

[1] Anderson's Dict. of Law.

[2] 105 Ill. 378.

[3] To the same effect: Globe Pub. Co. v. State Bank, 41 Neb. 75, 59 N. W. Rep. 683, overruling prior cases in that State; Merchants' Bank v. Bliss, 35 N. Y. 412; Miller v. White, 50 N. Y. 137; Willes v. Suydam, 64 N. Y. 173; Gadsden v. Woodward, 103 N. Y. 242, citing other cases in that State; Chase v. Curtis, 113 U. S. 452; Mitchell v. Hotchkiss, 48 Conn. 9; Engine Co. v. Hubbard, 101 U. S. 188; Breitung v. Lindauer, 37 Mich. 217; Gregory v. German Bank, 3 Colo. 332; Larson v. James (Colo.), 29 Pac. Rep. 183; Cable v. McCune, 26 Mo. 371.

[4] A. & N. R. R. Co. v. Baty, 6 Neb. 37.

[5] Wisconsin v. Pelican Ins. Co., 127 U. S. 265; Martin v. Hunter, 1 Wheat. 304; U. S. v. Lathrop, 17 Johns. 4; Delafield v. Illinois, 2 Hill, 159; State v. Pike, 15 N. H. 83; Blaine v. Curtis, 59 Vt. 120.

pecuniary penalties imposed for the violation of statutes.[6] The question is exhaustively considered by Mr. Justice Gray, in Huntington v. Attrill. He quotes from an opinion of Lord Watson in the English Privy Council the following as explaining the principle involved: "The rule had its foundation in the well recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State government, or of some one representing the public, were local in this sense, that they were only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which had for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex loci*, ought to be admitted in the courts of any other country. In its ordinary acceptation the word 'penal' might embrace penalties for infraction of general law, which did not constitute offenses against the State; it might for many legal purposes be applied with perfect propriety to penalties created by contract; and it, therefore, when taken by itself, failed to mark that distinction between civil rights and criminal wrongs which was the very essence of the international rule."[7]

Who May Sue on Penal Statutes.—The general rule is that an individual may not sue upon a penal statute unless the statute give him authority so to do.[8] But there are two cases in which an individual is held to be so authorized: (1.) Where the penalty is given to the person injured or affected by the violation of the statute. In this case the person to whom the penalty is given may sue in his own name.[9] (2.) Where a penalty is given to an informer who is expressly authorized to sue, or where a portion is given to the public or to some public institution, and the remainder to an informer in such language as shows an intention that the informer shall sue for it.[10] And it has been held that an informer may sue in his own name where a penalty is given to him in whole or in part for that reason alone, without any positive direction in the act imposing the penalty, on the ground that giving him a portion of the penalty indicates an intention that he sue for it.[11] But in most cases where an informer has been allowed to sue there has been something in the wording of the statute in addition to giving the penalty or a portion of it to the informer which indicated an intention that he sue for it. "No special formula," says Powers, J., in Drew v. Hiliker,[12] "is requisite to confer the right to sue. It is enough if it be seen that the intent was to confer the right." So where a penalty or a portion thereof is given to "the informer and prosecutor," "to anyone who will sue for it," "to the use of the complainant," etc., the informer has been held sufficiently authorized to sue.[13] So where the penalty was declared to be "recoverable one-half to the use of the informer."[14] But even in such cases the State may maintain a suit for the penalty. In C. & A. R. R. Co. v. Howard,[15] it is said: "The public alone do not have a right to this penalty unless they first sue for its recovery. If an informer sues he acquires an equal right with the public." The rule is that where a penalty is given in part to the public and in part to an informer, the State may prosecute for the whole unless an informer has begun an action, in which case the latter, if authorized by the statute, may sue for it on behalf of the State and of himself.[16] It is held also that the informer cannot obtain his

[6] Huntington v. Attrill, 146 U. S. 657.

[7] 8 L. T. Rep. 341.

[8] O. & R. V. R. Co. v. Hale, 45 Neb. 418, 63 N. W. Rep. 849; Fleming v. Bailey, 5 East, 313; Barnard v. Gosling, 2 East, 569; Colburn v. Swett, 1 Met. 232; Seward v. Beach, 29 Barb. 239; Smith v. Look, 108 Mass. 139.

[9] Bacon, Abr. Qui Tam Actions; Adams v. Cutright, 53 Ill. 361; Thompson v. Howe, 46 Barb. 187; R. R. Co. v. Cook, 37 Ohio St. 265.

[10] Drew v. Hilliker, 56 Vt. 64; Nye v. Lamphere, 2 Gray, 294; C. & A. R. R. Co. v. Howard, 38 Ill. 414; Lynch v. Economy, 27 Wis. 69; Middleton v. Wilmington, etc. R. R. Co., 95 N. C. 167; U. S. v. Laeseki, 29 Fed. Rep. 649; Winne v. Snow, 19 Fed. Rep. 507; Norman v. Dunbar, 8 Jones Law, 317; Kempton v. Savings Institution, 53 N. H. 581.

[11] C. & A. R. R. Co. v. Howard, 38 Ill. 414; Megargell v. Hazelton Coal Co., 8 Watts & Sergt. 342; City of Rockland v. Farnsworth (Me.), 32 Atl. Rep. 1012. See also Thompson v. Howe, 46 Barb. 287. *Contra:* O. & R. V. R. Co. v. Hale, 45 Neb. 418, 63 N. W. Rep. 849.

[12] 56 Vt. 64.

[13] Drew v. Hilliker, 56 Vt. 64; Nye v. Lamphere, 2 Gray, 294; Megargell v. Hazelton Coal Co., 8 Watts & Sergt. 342; Lynch v. Economy, 27 Wis. 69; Middleton v. Wilmington, etc. R. R. Co., 95 N. C. 167.

[14] U. S. v. Laeseki, 29 Fed. Rep. 699.

[15] 38 Ill. 414.

[16] Com. v. Howard, 13 Mass. 222; State v. Bishop, Conn. 181.

share of the penalty unless his name appears of record as complainant.[17]

Aggregation of Penalties—Speculating in Penalties.—Whether more than one penalty can be recovered in one action depends entirely upon the language of the statute. Unless the statute directs to the contrary penalties are not to be held cumulative, and a recovery for one penalty only is permitted for all violations of the statute up to the commencement of the action. "It is a wholesome rule not to allow a recovery for aggregated penalties unless the language of the statute clearly requires it."[18] But penal statutes very generally provide for such penalties, and where they use language requiring it, an accumulation of penalties is allowed and several may be recovered in one action. The usual language for this purpose is "each and every," or "each," or "every." Where a statute affixes a penalty to "every," or to "each," or to "each and every" violation, several penalties may be recovered in one action.[19] That is, if the statute imposes a penalty for every act and there are several distinct acts, the several penalties incurred may be recovered in one action. It is not always easy to say what constitute distinct acts. Where a penalty of so much a day for each or for "every" day of default is imposed, it is held that each day's default incurs a penalty and that aggregated penalties may be recovered.[20] So in the common case of statutes imposing penalties upon railroad companies for failure to ring or whistle at crossings, each failure is held to incur a penalty.[21] So where a penalty was imposed for overcharges by officials, each item of overcharge was held to incur a separate penalty, which the court said might be incurred "a hundred times a day."[22] And where a penalty of so much per tree was imposed for cutting trees on public land, it was held that several penalties were recoverable in one action.[23] Other cases are given in a note.[24] In several cases the courts have had under consideration what is called "speculation in penalties." Thus, in Fisher v. N. Y. C. R. Co.,[25] a statute provided a penalty for collecting excessive fare of passengers. The plaintiff made a business of riding back and forth in defendant's trains, each time paying excessive fare, with no other object than to sue for penalties. It was held that this was speculating in penalties, and that but one penalty could be recovered. A similar case is Parks v. Nashville, etc. Co.[26] In neither of these cases, however, did the statute sued on impose a penalty for "each," or for "every" violation, and the court remark this fact in each case and make it a ground of decision. In Suydam v. Smith,[27] and Grover v. Morris,[28] each cases in which the statute provided for an aggregation of penalties by appropriate language, the Fisher case is distinguished on that ground. So in St. L. & S. F. R. R. Co. v. Gill,[29] the plaintiff did exactly what was done in the Fisher case. The Fisher case was cited to the court, but under the statute sued on it was held that the plaintiff was entitled to recover a number of penalties. The court said that the statute was intended to deter railroad companies from making overcharges "by punishing every such act," which could only be done by allowing an aggregation of penalties. It is only in cases where for some other reason more than one penalty was not recoverable that courts have taken any notice of speculation in penalties. Where the statute imposes a specific penalty for each offense, it intends an aggregation of penalties, and whether or not there has been speculation in penalties is immaterial. The

[17] State v. Smith, 49 N. H. 155.

[18] Sturgis v. Spofford, 45 N. Y. 53; Fisher v. N. Y. Cent. R. R. Co., 46 N. Y. 654; Parks v. Nashville, etc. R. R. Co., 13 Lea, 1; U. S. v. Guaranty Co., 8 Benedict, 289; Atty. Gen. v. McLean, 1 H. & C. 750; Garrett v. Messenger, L. R. 2 C. P. 583; Parry v. Croydon Comr's, 15 C. B. 567; Chapman v. Chapman, 1 Root, 52; Barber v. Eno, 2 Root, 150.

[19] Deyo v. Rood, 3 Hill, 527; Bartolett v. Achey, 38 Pa. St. 273; Suydam v. Smith, 52 N. Y. 382; Grover v. Morris, 73 N. Y. 474; R. R. Co. v. Cook, 37 Ohio St. 265; Ry. Co. v. Moore, 33 Ohio St. 384, 393; State v. I. & I. S. Ry. Co. 133 Ind. 64; Streeter v. C., M. & St. P. R. R. Co., 40 Wis. 294, 301; State v. K. C., etc. R. R. Co., 32 Fed. Rep. 722; Holland v. Bothmar, 4 Term Rep. 228; Brooks v. Milliken, 3 Term Rep. 509; R. v. Matthews, 10 Mod. 26; R. v. Bleasdale, 4 Term Rep. 809.

[20] State v. K. C., etc. R. R. Co., 32 Fed. Rep. 722; Board of Com'rs v. Erie Ry. Co., 5 Robt. (N. Y.) 366; Toledo, etc. Ry. Co. v. Stevenson, 131 Ind. 203.

[21] C. & A. R. R. Co. v. Howard, 38 Ill. 414; People v. N. Y. C. Ry. Co., 13 N. Y. 78, 82.

[22] Bartolett v. Achey, 38 Pa. St. 273.

[23] People v. McFadden, 13 Wend. 396.

[24] Gibson v. Gault, 33 Pa. St. 44; Levy v. Gowdy, 2 Allen, 320; Dallas v. Hendry, 3 N. J. L. 973.

[25] 46 N. Y. 654.

[26] 1 Lea, 1.

[27] 52 N. Y. 382, 388.

[28] 73 N. Y. 474.

[29] 54 Ark. 101.

language of the statute is the thing to be considered, and is decisive. In State v. K. C., etc. R. R. Co.,[30] the case was a very hard one, as the penalties of $25 for each day of default amounted to $30,000. Brewer, J., said: "It (the statute) does not impose a penalty simply for failure to construct a depot, but it says that for each day from and after a specified day the defendant shall forfeit and pay the sum of $25. Now that language fails of meaning if after a lapse of years of delinquency but one penalty was recoverable. * * * Giving to this language the force which each word requires, it must be held that the legislature intended an accumulation of penalties and the delinquent cannot atone for its delinquencies by the payment of a single penalty."[31]

Effect of Repeal of Penal Statutes.—It is an established rule that an action upon a penal statute will abate upon repeal of the statute before final judgment unless the statute contains an exception as to pending suits.[32] For the purposes of this rule the word penal is taken in its wider sense, and all remedies and liabilities given or created by statute which depend solely upon the statute and which are given or created by way of punishment for a violation of its provisions are held to be penal.[33]

Constitutionality of Penal Statutes.—Interesting questions as to the constitutionality of penal statutes arise in many States where there are constitutional provisions giving all penalties, or the proceeds of all penalties to the school fund. Some courts distinguish between statutes giving all or a portion of a penalty to an informer, and those giving a penalty by way of remedy to the person affected by a breach of the statute, and hold that the former are unconstitutional, while the latter are not within the constitutional provision.[34] Other authorities refuse to make such a distinction.[35] In States where the constitution directs payment of the "clear proceeds" or the "net proceeds" of all fines and penalties into the school fund it is held, that this authorizes the legislature to give a portion of the penalty to an informer, but not the whole penalty.[36] Where no such words are used, it has been held that no portion of the penalty could be given to an informer.[37] But other courts have put a different construction on such constitutional provisions, and have held that they refer solely to that portion of the penalty given to the public; that the provisions in question were intended to control the disposition of funds accruing to the public from such sources, and not to limit the power of the legislature to impose penalties as remedies to persons affected by violations of statutes or to give a portion to informers by way of inducement to enforce their provisions.[38] The latter would seem to be the more correct view. The courts which hold to the contrary are forced to distinguish those statutes which give penalties to persons affected, though the same courts in other cases continually refer to such statutes as penal.[39] And it is difficult to perceive how it can be contended that if the words "all penalties" are to be taken literally and strictly they can be said not to include such cases. The remedies given by such statutes never bear any relation or proportion to the actual damage sustained. After the party specially affected by a violation of such a statute has received his actual damages, he is fully compensated. The remainder imposed by way of penalty goes to him because he brings the suit and as an inducement to him to bring it and secure enforcement of the law—and so as a *quasi* informer—and wherein is he any better than the informer who suffers actual damage

[30] 32 Fed. Rep. 722.

[31] As to speculation in penalties, see also Streeter v. C., M. & St. P. R. R. Co., 40 Wis. 294, 301.

[32] Norris v. Crocker, 13 How. 329; Bank v. State, 12 Ga. 475; Chicago v. Adler, 56 Ill. 344; People v. Livingston, 6 Wend. 526; Com. v. Welch, 2 Dana, 330; Lewis v. Foster, 1 N. H. 61; Pope v. Lewis, 4 Ala. 487; Maryland v. B. & O. R. R. Co., 3 How. 534; Yeaton v. U. S., 5 Cranch, 281; Schooner Rachel v. U. S., 6 Cranch, 329; U. S. v. Preston, 3 Pet. 57; Com. v. Marshall, 11 Pick. 350; Com. v. Kimball, 21 Pick. 373.

[33] Globe Pub. Co. v. State Bank, 41 Neb. 175; Knox v. Baldwin, 80 N. Y. 610; Victory, etc. Co. v. Beecher, 97 N. Y. 651; Breitung v. Lindauer, 37 Mich. 217.

[34] Dutton v. Fowler, 27 Wis. 430; Stone v. Lannon, 6 Wis. 597; Shields v. Klopf, 70 Wis. 73; Graham v. Kibble, 9 Neb. 182; A., T. & S. F. R. R. Co. v. State, 22 Kan. 1.

[35] A. & N. R. R. Co. v. Baty, 6 Neb. 45; Barnet v. A. & P. R. R. Co., 68 Mo. 56; State v. W., St. L. & P. Ry. Co., 89 Mo. 562.

[36] State v. W., St. L. & P. Ry. Co., 89 Mo. 562; Dutton v. Fowler, 27 Wis. 427.

[37] A., T. & S. F. R. R. Co. v. State, 22 Kan. 1.

[38] Katzenstein v. Raleigh, etc. R. R. Co., 84 N. C. 688, 693; Toledo, etc. R. Co. v. Stevenson, 131 Ind. 268; State v. I. & I. S. R. Co., 133 Ind. 69, and other Indiana cases referred to therein. See also Graham v. Kibble, 9 Neb. 182, 184; Barnet v. A. & P. R. R. Co., 68 Mo. 56.

[39] Shields v. Klopf, 70 Wis. 73.

only as one of the public in a case where no one person sustains special injury? The word penalty in such constitutional provisions must be held to have been used in its ordinary acceptation, and if so it includes all penalties, as well those given to persons supposed to be specially affected by breach of a statute as those given in whole or in part to common informers. And if this construction is placed on the word penalty, it follows, since no one will contend that the provisions in question are intended to prevent the imposition of penalties by way of remedies to persons injured, that the constitutional provisions must be held to refer solely to such moneys arising from the sources mentioned as are given to the public, and not to such penalties or portions thereof as are given to individuals—in whatever capacity. It would be hard to say which construction has the preponderance of authority in its favor; especially as the question is complicated by the differences in phraseology of the various constitutions which have been passed upon. Additional cases bearing on the question are given in a note.[40]

Liability to Penalties Where Default is Due to Act of Servant or Agent.—In an English case it was held that where a statute imposed a penalty upon mine owners for failure to properly use and inspect safety lamps, there being no proof of personal default, an owner was not liable for the act of an agent.[41] But American courts generally hold to the contrary, though the matter doubtless depends somewhat upon the language of the statute sued on.[42] Where the defendant is a corporation which can act only through servants and employees, and especially where the nature of the statute is such as to make it a matter of general public concern that it be observed, it is likely that the corporation would be held liable although its principal officers were in no way in default.

Matters of Practice and Procedure.—At common law it was necessary to describe the statute sued on in the pleadings with great particularity, and to allege that the liability accrued "by force of the statute."[43] It was also held necessary to allege that the defendant's acts were *contra formam statuti*.[44] But it is generally held unnecessary to do more than to bring the case within the description of the statute,[45] and a complaint in the language of the statute has been held sufficient.[46] An action to recover a penalty given by a penal statute, whether brought by an informer or by the State, is not a criminal prosecution, and the plaintiff's case need not be established beyond a reasonable doubt. The same rule prevails as to the quantum of evidence required as in other civil cases.[47] The judgment rendered must be to the uses required by law and in accordance with the disposition of the penalty made by the statute, otherwise it is erroneous.[48] Actions by common informers cannot be compromised without leave of court,[49] and courts will not, as a rule, grant leave to dismiss except upon payment of the portion of the penalty given to the public.[50] A release or discharge by an informer is void as to the portion of the penalty belonging to the public,[51] and an informer can only satisfy the judgment as to his share.[52]

ROSCOE POUND.

Lincoln, Neb.

[40] Lynch v. Economy, 27 Wis. 69; St. L., I. M. & S. Ry. Co. v. State, 55 Ark. 200; St. L., A. & T. Ry. Co. v. State (Ark.), 19 S. W. Rep. 572.

[41] Dickinson v. Fletcher, L. R. 9 C. P. 1.

[42] Chase v. N. Y. C. R. R. Co., 26 N. Y. 523, 528; Byron v. Crippen, 4 Gray, 314; Com. v. Emmons, 98 Mass. 6, 8.

[43] Nichols v. Squires, 5 Pick. 168; People v. Bartow, 6 Cowen, 290.

[44] Nichols v. Squires, 5 Pick. 168. *Contra:* People v. Bartow, 6 Cowen, 290; State v. Berry, 4 Halst. (N. J.) 374.

[45] Hudson v. State, 1 Blackf. 318; Fuller v. State, 1 Blackf. 65.

[46] Com. v. Richardson, 142 Mass. 75.

[47] Hitchcock v. Munger, 15 N. H. 97.

[48] Doss v. State, 6 Tex. 433.

[49] Rayham v. Rouncesville, 9 Pick. 44.

[50] Brown v. Bailey, 4 Burr. 1929.

[51] Minton v. Woodworth, 11 Johns. 474, 476.

[52] Casswell v. Allen, 10 Johns. 118; Wardens v. Cope, 2 Ired. 44; Middleton v. Wilmington, etc. R. Co., 95 N. C. 167.

NEGLIGENCE OF ATTORNEY—LIABILITY TO THIRD PERSON.

BUCKLEY V. GRAY.

Supreme Court of California, Dec. 10, 1895.

1. An attorney employed to draw a will is not liable to a person who, through the attorney's negligence and ignorance in the discharge of his professional duties, was deprived of the portion of the estate which testator instructed the attorney should be given such person by the will.

2. Civ. Code, § 1559, providing that a contract made expressly for a third person may be enforced by him, does not authorize a suit for damages against an at-

torney by a person who, through the attorney's negligence, was deprived of the portion of an estate which a testator, who employed the attorney to draw his will, desired to be given to him.

VAN FLEET, J.: Action to recover for negligence of attorney in drafting and executing a will. The court below sustained a demurrer to the complaint, and, plaintiff, failing to amend, judgment was entered against him, from which he appeals. The complaint alleges, in substance, that on October 5, 1895, defendant, an attorney at law, was employed by Mrs. C. M. A. Buckley, the mother of plaintiff, to draw her will, which she desired and directed to be so drawn as to leave all the residue of her estate, after certain specific legacies, to her two sons, then living, the plaintiff and one John P. Buckley, to the exclusion of the children of a deceased son of the testatrix; that in pursuance of such employment defendant on said day drew a will for said testatrix, and superintended and directed the execution thereof; that in the preparation of said will, and in directing the execution thereof, the defendant was guilty of gross carelessness and negligence in the performance of his professional duties, in this: that said will was so drawn as not to legally express the desires or direction of the testatrix as to the exclusion of said grandchildren, but in such manner that the latter were permitted to take of her estate; and that in directing the execution of said will this plaintiff, although named in said will as one of the devisees thereunder, was caused by the defendant to become one of the subscribing witnesses thereto, thereby rendering the provisions of said will as to the plaintiff void. It is further alleged that said John P. Buckley died before the testatrix; that thereafter, in May, 1891, said testatrix died without having revoked or altered said will; that the will was admitted to probate, and the estate of said testatrix duly administered; and that under the decree of distribution said grandchildren received one-half of said estate, amounting to $85,000, in which amount plaintiff alleges himself damaged, and for which he asks judgment against defendant.

We think the demurrer was properly sustained. In our judgment the complaint clearly fails to state a cause of action against defendant in favor of the plaintiff. It is to be observed that the action is not by the client, but by a third party, her son. It is a general doctrine, sustained by an overwhelming weight of authority, that an attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care, to his client alone, that is, to the one between whom and the attorney the contract of employment and service existed, and not to third parties. The exceptions to this general rule, if they may be in strictness deemed such, are where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act. Responsibility for a fraudulent act is independent of any contractual relation between the guilty party and the one injured; and one committing a malicious or tortious act, to the injury of another, is liable therefor, without reference to any question of privity between himself and the wronged one. Where, however, neither of these elements enters into the transaction, the rule is universal that for an injury arising from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter. 2 Shear. & R. Neg. §§ 562, 574; Bank v. Ward, 100 U. S. 195, and cases therein cited; Roddy v. Railway Co., 104 Mo. 234, 15 S. W. Rep. 1112, and cases cited. In Bank v. Ward, *supra*, the general rule above adverted to is exhaustively discussed, and its limitations stated by Mr. Justice Clifford, for the court. That was a case where a third party sought to maintain an action against the attorney for damages resulting to him for relying upon the correctness of a defective certificate of title to a piece of real estate furnished by the attorney to a client, upon the faith of which the plaintiff had loaned money on the property. In holding that the plaintiff could not maintain the action, it is there said: "Beyond all doubt, the general rule is that the obligation of the attorney is to his client, and not to a third party, and, unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained. Shear. & R. Neg. § 215. Conclusive support to that rule is found in several cases of high authority. Fish v. Kelly, 17 C. B. (N. S.) 194." And, after commenting upon the case of Fish v. Kelly, and the case of Robertson v. Fleming, 4 Macq. H. L. Cas. 167, 209, from the latter of which cases Lord Wensleydale is quoted as saying that "he, only, who, by himself or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue him for that neglect, and that that employment must be affirmed in the declaration of the suit in distinct terms,"—the learned justice proceeds: "Analogous cases involving the same principle are quite numerous, a few of which only will be noticed. They show to a demonstration that it is not every one who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, 'the limit of the doctrine relating to actionable negligence,' says Beasley, C. J., 'is that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigous intricacies of the ill effects of the negligence of men may be followed down the chain of results to the final effect.' Kahl v. Love, 37 N. J. Law, 5, 8. * * * Cases where fraud and collusion

are alleged and proved constitute exceptions to that rule, and Parke, B., very properly admits, in the following case, that other exceptions to it exist which are as sound in principle as the judgments which establish the rule. Longmeid v. Holliday, 6 Exch. 761-767. Examples of the kind are given in that case, two of which deserve to be noticed, as they have been urged in argument to disprove the rule; but they cannot have any such effect, for the plain reason that they stand in many respects upon a different footing, 'these cases,' say the court in that opinion, 'occur where there has been a wrong done to the person, for which he would have a right of action, though no such contract had been made;' and the court gives as an illustration the patient injured by improper medicines prepared by an apothecary, or one unskillfully treated by a surgeon, where both would be liable to the injured party, even if the father or friend of the patient contracted with the wrongdoer." In Roddy v. Railway Co., *supra*, it is said: "The right of a third party to maintain an action for injuries resulting from a breach of contract between two contracting parties has been denied by the overwhelming weight of authority of the State and federal courts of this country and the courts of England. To hold that such actions could be maintained would not only lead to endless complications in following out cause and effect, but would restrict and embarrass the right to make contracts by burdening them with obligations and liabilities to others, which parties would not voluntarily assume;" citing Winterbottom v. Wright, 10 Mees. & W. 109, and a large number of other cases. "The rule is put upon two grounds, either of which is unquestionably sound. One ground is given by the court in the opinion in Winterbottom v. Wright, 10 Mees. & W. 109, as follows: 'If we were to hold that plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract. If we go one step beyond that, there is no reason why we should not go fifty.' The other ground is thus stated in the New Jersey case above cited: 'The object of parties in inserting in their contracts specific undertakings, with respect to the work to be done, is to create an obligation *inter esse*. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in a contract, in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contracts. Plaintiff, not being a party to the contract, cannot maintain this action on account of injuries resulting from any breach of duty defendant owed Pickle, arising purely out of the terms of the contract between them.'"

No authority has been brought to our notice contravening the rule as stated in the foregoing citations. Some, which at first glance might be so taken, will be found upon analysis to fall within one or the other of the exceptions noted, and not to infringe upon the general doctrine. Within such class fall the cases relied upon by plaintiff to support his general right to maintain the action. This case comes strictly within the general doctrine as above stated. No fact is alleged bringing it within any of the exceptions thereto. It is not alleged that defendant did the act charged maliciously or through any evil intent, or with any fraudulent purpose, or that he did it in any affirmative sense. The complaint proceeds solely upon the theory that it was through negligence arising either from ignorance or carelessness, or both; and this, although it may be conceded that the complaint discloses an instance of the grossest ignorance on the one hand, or unpardonable carelessness on the other, and shows very grievous injury to plaintiff as a result, does not, within the principles above announced, make a case entitling the plaintiff to maintain the action. It is claimed, however, that the action can be maintained under the rule, expressed in Section 1559 of our Civil Code, that a contract made by one person with another for the benefit of a third person may be enforced by the latter, the argument being that the employment of defendant by plaintiff's mother to draw her will was clearly for plaintiff's benefit, inasmuch as the latter was one of the objects of her bounty, as expressed in her will; and a number of cases are cited which are supposed to bring the case within that rule. But in our judgment that provision has no application to this case. It is intended to apply to instances where the contract is made expressly for the benefit of the third person, not where the third person is or may be merely incidentally or remotely benefited as a result of such contract. Such is the language of the code, and such will be found to be the application of the doctrine in all the cases cited by counsel, or which have come to our attention. The terms of Section 1559 are: "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." This rule, we are told by Mr. Pomeroy (Rem. & Rem. Rights, § 139), was originally adopted prior to the reformed procedure, being based partly upon considerations of convenience and partly upon a liberal construction of the nature of the contract, and the purpose of which was to avoid circuity of action, and to enable the real party in interest to sue. That author proceeds to give us illustrations of its application, and each instance given is a case where the contract was in express terms made for the benefit of the third party, and by reason of which the latter became the real party in interest. No such application of the doctrine as is here contended for is even remotely hinted at. The contract between the plaintiff's mother and the defendant, which was the subject of the breach, cannot be said in any legal sense to have been expressly made for plaintiff's benefit. It was a contract for employ-

ment of defendant's services as an attorney to draft the will of Mrs. Buckley, the immediate purpose of which was for the benefit of the latter, to enable her to make disposition of her estate in accordance with her desire. Remotely, it is true, she intended plaintiff to be benefited as a result of such contract by providing for him in her will. Such provision, however, could create no vested right in plaintiff until the death of the testatrix. Until that event the will remained purely ambulatory, and the provision for plaintiff could be at any time changed or withdrawn. It therefore created a mere possibility in plaintiff; not a right which made him in law a privy to the contract. To hold that, by reason of the provision for plaintiff in the will, the contract is to be considered one made expressly for his benefit, is to confound the terms of the will with those of the contract. The latter alone was the subject of the breach, and by defendant's negligence in carrying out that contract the testatrix alone suffered legal injury. Although the ultimate consequential injury to plaintiff would appear to have been great, it was, so far as defendant is concerned, *damnum absque injuria*, against which the courts are powerless to relieve. In this view, it is not material to notice the other objections made to the complaint. The demurrer having been properly sustained, it follows that the judgment should be affirmed. It is so ordered.

NOTE.—The doctrine invoked in the principal case, that a man owes contractual duties only to those from whom the consideration moves and to whom he makes his undertaking is now clearly settled, though some courts in its application, for instance, to abstractors of titles, have failed to follow it. Thus an officer can be sued for falsely and fraudulently certifying an acknowledgment to a deed only by the party taking directly under the conveyance, and not by a subsequent purchaser of the property. Ware v. Brown, 2 Bond, 267. So a purchaser cannot sue a tax collector, for giving a tax receipt to the owner, for taxes not paid, which receipt being exhibited was acted upon by such purchaser, the land being afterwards sold by the collector for taxes. "The limit of the doctrine relating to actionable negligence," said the court, "is that the person occasioning the loss must owe a duty arising from contract or otherwise, to the person sustaining such loss. There would be no bounds to actions and litigious intricacies, if the ill effects of the negligence of men could be followed down the chain of results to the final effect." The case of Winterbottom v. Wright, 10 Mees. & W. 109, is a leading one on this subject. There the defendant had contracted with the postmaster-general to furnish a mail coach, and the plaintiff was injured by the defective construction of the coach. It was held that the defendant owed no duty to anyone else but the postmaster-general, and was not liable. "If we were to hold that the plaintiff could sue in such a case," said the court, "there is no point at which such actions would stop. The only safe course is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty." Longmild v. Holliday, 6 Exchequer, 761, holds that one who sells a defective article to be used for a particular purpose, for which it is not fit, is not in the absence of fraud liable for an injury caused to a third person, by some defect, in the construction of such article. Collins v. Selden, L. R. 3 C. P. 495, is a still better illustration of this doctrine. There the defendants had negligently hung a chandelier in a public house, frequented, as they knew, by the public, and the chandelier falling, the plaintiff was injured. The court, in holding the defendants not liable, remarked that they could see no relation which the plaintiff bore to the defendants, whence a duty could result which had been infringed. The court in the tax case above cited, declared that the collector owed no duty to anyone, but those with whom he transacted the business. One who is injured by a run away horse, cannot sue the city maintaining the post to which the horse had been attached, and by reason of the defective condition of which, the horse was enabled to escape. Rockport v. Tripp, cited by Judge Cooley in his work on Torts, p. 70, note 1. In Thomas v. Winchester, 6 N. Y. 307, Big. Lead. Cas. 602, a wholesale druggist who sold to a retail druggist a package of poison labeled dandelion, was held responsible to one who purchased the same of the latter for dandelion. The court distinguished this case from the general rule, because the defendant knew his obligation was to use due care towards anyone that might purchase the drug. See Langridge v. Levy, 2 M. & W. 519, 4 M. & W. 337, for an application of the same exception to the general rule. Wellington v. Downer's Oil Co., 104 Mass. 64. In Dalyell v. Tyner, Ellis, B. & El. 899, may be seen an important qualification to Winterbottom v. Wright. There the defendant had contracted with B to let him his steamboat and crew, and by the mismanagement of the crew, a passenger was injured and it was held that the defendant was responsible. In Davidson v. Nichols, 11 Allen, 514, it is said that the builder of a railway carriage should be liable to every passenger injured by reason of its defective construction. In Losee v. Clute, 51 N. Y. 494, the manufacturer of a boiler was held not responsible to one injured by its explosion. In United Soc'y v. Underwood, 9 Bush, 609, the directors were held liable to depositors for their official neglect, whereby the bank became bankrupt, to the injury of the depositors. Hodges v. New England Screw Co., 1 R. I. 312; Lexington R. Co. v. Bridges, 7 B. Mon. 556; Salmon v. Richardson, 30 Conn. 360; Koehler v. Iron Co., 2 Black, 715; Conant v. Seneca Bank, 1 Ohio St. 310. It may be said however that the general rule of law is that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract. The following are some of the later cases not cited in the principal case: Exchange Bank v. Rice, 107 Mass. 37; Stoddard v. Ham, 129 Mass. 383, 37 Amer. Rep. 369; Reed v. Home Sav. Bank, 127 Mass. 295; Moore v. Moore, 127 Mass. 22; Lang v. Henry, 54 N. H. 37; Jackson v. Smith, 52 N. H. 11; Fugure v. Mutual Soc. of St. Joseph, 46 Vt. 362; Colt v. Ives, 31 Conn. 25, 81 Amer. Dec. 161; Edwards v. Clement (Mich.), 45 N. W. Rep. 1107. In 35 Cent. L. J. 108 and 112, will be found a valuable discussion of the question how far the manufacturer of a machine is liable for injury to a third person, the conclusion being that the duty of a manufacturer and vendor to make it of good material and workmanship does not extend beyond the person with whom he contracts, and that in the absence of a knowledge of the defect he is not liable for an injury caused by the explosion of a defectively constructed cylinder to one of the men attending the machine, with whom he had no privity of contract. Jaggard on Torts, which is the latest (1895) and most exhaustive treatise on the subject has

this to say of the question: "In actions against members of the bar for negligence it is well settled that only the person with whom the attorney contracts can maintain the action, for it is to him alone that the attorney owes a particular duty." 2 Jaggard on Torts, p. 904, citing Dundee Mortgage & Trust Inv. Co. v. Hughes, 20 Fed. Rep. 39; Savings Bank v. Ward, 100 U. S. 195; Fish v. Kelly, 17 C. B. (N. S.) 194. See, also, 2 Jaggard on Torts, § 260, *et seq.*, for a valuable discussion of the various branches of this subject.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACCIDENT INSURANCE — Employers' Liability Insurance—Notice of Injury.—The Fidelity & Casualty Company of New York issued an employers' liability policy to the Anoka Lumber Company, containing this clause: "The assured, upon the occurrence of an accident, and upon the notice of any claim on account of an accident, shall give immediate notice in writing of such accident or claim, with the fullest information available, to the company, at its office in New York City, or to the agent, if any, who shall have countersigned this policy:" Held, that the assured need not give such notice until an accident happens and a notice of a claim is made on account thereof.—ANOKA LUMBER CO. v. FIDELITY & CASUALTY CO. OF NEW YORK, Minn., 65 N. W. Rep. 353.

2. ADMINISTRATION—Executors and Administrators—Appointment.—On a contest between the public administrator and the father of an intestate for letters of administration the public administrator and the wife of the father testified that the father's reputation for providence and sobriety was bad. The father denied that he drank to excess, and a number of witnesses testified that they had known the father for years, and considered him a sober and industrious man: Held, that an order granting letters of administration to the father would not be disturbed on the ground that the evidence showed that the father was "improvident."—IN RE CONNORS' ESTATE, Cal., 42 Pac. Rep. 906.

3. ADVERSE POSSESSION.—The holder of title to land derived from the United States is constructively in possession of the land until actually ousted or disseized.—ZIRNGIBL v. CALUMET & C. CANAL & DOCK CO., Ill., 42 N. E. Rep. 431.

4. APPEAL—Case Made.—Where a case made is served and acknowledged by the opposite party, a statement of something which occurred subsequent to said service cannot be a part of the legal "case made," for the reason that the said statement has not been served upon the opposite party.—ATCHISON, T. & S. F. R. CO. v. DITMARS, Kan., 42 Pac. Rep. 933.

5. APPEAL—Record.—A bill of exceptions not shown by the transcript to have been filed in the office of the clerk of the trial court is not part of the record on appeal.—UEKER v. BEDFORD BLUESTONE CO., Ind., 42 N. E. Rep. 459.

6. APPEAL—Remand of Cause.—If the circuit court mistakes or misconstrues the decree of the Supreme Court, and does not gives full effect to the mandate, its action may be controlled either upon a new appeal, if a sufficient amount is involved, or by a writ of *mandamus* to execute the mandate.—IN RE SANFORD FORK & TOOL CO., U. S. S. C., 16 S. C. Rep. 291.

7. APPLICATION OF PAYMENTS.—J, who owed the firm of F & F over $100 on account, and in the same capacity $175 evidenced by his past-due, unsecured, promissory note, having paid $100 without manifesting any desire or preference as to which of the claims the money should be applied, it is held, in an action upon the promissory note, that said creditors had the right to use the money to extinguish the account, and that the debtor has no legal cause to complain.—FARGO v. JENNINGS, S. Dak., 65 N. W. Rep. 433.

8. ASSAULT AND BATTERY—Evidence.—In a civil action for assault and battery, evidence of the general reputation of defendant for peace and quietness is not admissible.—VANCE v. RICHARDSON, Cal., 42 Pac. Rep. 909.

9. ATTACHMENT—Claim not Due.—It is only when the action is brought on a claim not due that the plaintiff is entitled to an attachment, on the ground that his debtor is about to remove his property with the intent "of hindering and delaying" him in the collection of his debt.—FOLEY-WADSWORTH IMPLEMENT CO. v. PORTEOUS, S. Dak., 65 N. W. Rep. 429.

10. ATTORNEY'S LIEN—Intervening Creditor's Lien.—Code, § 215, subd. 3, gives an attorney a lien for a general balance of compensation on money due his client in the hands of the adverse party in an action in which he is employed, from the time written notice, stating the amount and services, is given such adverse party; subdivision 4 provides that, after judgment, the notice may be given and made effective against the judgment debtor by entering it in the docket judgment, opposite the entry of judgment: Held that, where a judgment requires the claim of an intervening creditor of the plaintiff to be first paid out of the amount for which plaintiff has judgment, the right of the creditor is superior to the lien of an attorney.—WARD v. SHERBONDY, Iowa, 65 N. W. Rep. 413.

11. BANKS — Proceeds of Mortgaged Chattels — Deposit.—In an action by a mortgagee of chattels to hold a bank for proceeds of the mortgaged property deposited in the form of a draft by the mortgagor (cashier of the bank) to his account, and applied by the bank to the debt of the mortgagor to it, the admissions of declarations of the mortgagor made after such application, while cashier of the bank, that the application by the bank was without his consent, and that he had sent the draft to the bank in good faith, that the mortgagee should have the money, is harmless error; the mortgagor having testified to the same effect, and the evidence being immaterial, the question being whether the bank had notice of the mortgagee's rights.—ROCK SPRINGS NAT. BANK OF ROCK SPRINGS v. LUMAN, Wyo., 42 Pac. Rep. 874.

12. BENEVOLENT SOCIETIES—Constitution—Expulsion.—The fact that one discharged from membership in a voluntary benevolent association has not pursued the remedies for reinstatement provided by laws of the as-

sociation is a good defense in a civil action against the association for reinstatement. — LEVY V. MAGNOLIA LODGE, No. 29, I. O. O. F., Cal., 42 Pac. Rep. 887.

13. BILL OF EXCEPTIONS—Time of Filing.—A bill of exceptions not filed till after the statutory time is not rendered sufficient by a statement, signed by the judge, following his signature to the bill, that the bill was presented to him on a certain date, which was within the time allowed for filing it, as the statute requires that such statement shall be contained in the bill.—DAVIS V. NATIONAL FORGE & IRON CO., Ind., 42 N. E. Rep. 473.

14. BUILDING AND LOAN ASSOCIATION.—A provision in the charter of a building and loan association, that "at no time shall more than one-half of the funds in the treasury be subject to the demands of withdrawing members," does not prevent a member who has given proper notice of his withdrawal from recovering judgment on claim for the amount paid in.—PRINTERS' BUILDING & LOAN ASS'N V. PAXTON, Tex., 33 S. W. Rep. 389.

15. BUILDING AND LOAN ASSOCIATIONS—Constitutional Law.—Act 1887 (Laws 1887, p. 114), providing, in regard to building and loan associations, that in determining whether the assets are sufficient to pay the face value of the stock, so that the maturity of the stock may be declared, the average premiums paid by borrowing members shall be credited on the non-borrowing stock, is unconstitutional, as applied to subscription contracts entered into before the passage of the act.—FISHER V. PATTON, Mo., 33 S. W. Rep. 451.

16. CARRIERS—Misdelivery of Freight — Connecting Lines.—Where goods consigned on commission are received by a railroad company to be carried beyond its own route, under an agreement between the connecting companies by which each company is entitled to a proportion of the freight, the company which carries the goods to their destination is liable to the consignor for a delivery to a person not authorized to receive them.—CAVALLARO V. TEXAS & P. RY. CO., Cal., 42 Pac. Rep. 918.

17. CARRIERS—Passengers—Trespasser on Engine.—Where a rule of a railway company prohibits persons riding on the engine, a person riding on a switch engine at the invitation of the engineer, who is aware that the engine is not intended for the carriage of passengers, cannot hold the company liable for injuries to him as a passenger.—WILCOX V. SAN ANTONIO & A. P. RY. CO., Tex., 33 S. W. Rep. 379.

18. CONDEMNATION PROCEEDINGS — Instructions.—In condemnation proceedings by a natural gas and oil company for the purpose of laying pipes to convey natural gas, it is error to charge that the jury may consider the probability of injuries from fire or explosions which may result from the ordinary, prudent, and careful operation of the pipe line, in the absence of any evidence of the probability of such injuries.—INDIANA NATURAL GAS & OIL CO. V. JONES, Ind., 42 N. E. Rep. 487.

19. CONSTITUTIONAL LAW—Taxation.—Express Companies.—Rev. St. 1894, § 8484, providing for the assessment of the property of express companies within the State as a unit profit-producing system by taking the proportion of the entire value of its capital stock, less the value of all its property locally taxable without the State which the route mileage of the company within the State bears to the entire route mileage of the company, and from the amount so found subtracting the value of the property of the company locally assessable within the State, is constitutional. — STATE V. ADAMS EXP. CO., Ind., 42 N. E. Rep. 483.

20. CONTRACT—Construction.—An agreement recited that one party was the owner of certain patents, and was engaged in the manufacture and sale of articles covered by them and other articles, and that the other party desired to acquire the exclusive right to manufacture and sell "all the articles now manufactured and sold by" said party, and contained a grant of the first party's good will, business, and patents, and an agreement by the second party to pay the first party a percentage "of the net aggregate sales of the line of goods above mentioned, hereafter sold by the party of the second part." Held, that such percentage must be paid on the unpatented as well as on the patented articles.—A. B. DICK CO. V. SHERWOOD LETTER FILE CO., Ill., 42 N. E. Rep. 440.

21. CONTRACT — Construction — Right of Action.—There being a well-settled distinction between an agreement to indemnify and an agreement to pay, an action upon a breach of covenant to pay to a third party, at a specified time, a stipulated amount of money, and to cause certain real property to be released from the lien of a mortgage given by the plaintiff to secure the payment thereof, is maintainable by the promisee against the promisor, although the former has neither paid the money nor sustained actual injury by reason of the failure on the part of the former to perform his contract.—CALLENDER V. EDMISON, S. Dak., 65 N. W. Rep. 425.

22. CONTRACT — Fraudulent — Rescission.—A person may rescind and repudiate a contract, or he may affirm the contract, and recover upon a breach of warranty contained therein, if the contract contains a warranty, or he may affirm the contract, and recover whatever damages he may have sustained by reason of the fraud.—KANSAS REFRIGERATOR CO. V. PERT, Kan., 42 Pac. Rep. 943.

23. CONTRACT—Place of Performance.—Under a mortgage conditioned that the mortgagor shall furnish the mortgagee and his wife, during life, comfortable rooms, food, clothing, medicine and medical attendance in sickness, and provide them with the necessaries and comforts suitable for persons of their age and situation in life, no place being specified where such support shall be furnished them, they are not obliged to receive it at the house of the mortgagor, but are entitled to have it furnished at such reasonable place or places as they may select. — TUTTLE V. BURGETT'S ADM'R, Ohio, 42 N. E. Rep. 427.

24. CONTRACT—Promise to Pay Debt Discharged by Bankruptcy.—A mere promise by a debtor, who has been discharged in bankruptcy, to pay a prior debt "as soon as he could," is insufficient to support an action, without allegation and proof of the promisor's ability to pay the debt.—TOLLE V. SMITH'S EX'R, Ky., 33 S. W. Rep. 410.

25. CONTRACT BY LIMITED PARTNERSHIP—Validity.—Persons doing business as a limited partnership under the laws of the State of Pennsylvania cannot maintain an action to recover damages for the breach of a contract entered into for the purchase from them of certain goods of their manufacture, when the laws under which they were organized expressly prohibit them from contracting such liability in the manner attempted by the contract sued upon.—PARK BROS. & CO. V. HARWI, Kan., 42 Pac. Rep. 939.

26. CONTRACT WITH STATE—Assignment.—A contract made with the State to do the class of printing specified therein, under the provisions of chapter 99, Laws 1891, which does not contain any stipulation prohibiting its assignment, may be assigned.—CARTER V. STATE, S. Dak., 65 N. W. Rep. 422.

27. CONVERSION BY VENDOR—Liability of Vendee.—Where a vendee has converted and mingled with his own the logs of another, a notice by such other to the vendee of the conversion, and that the vendor is delivering the converted logs mingled with his own to him, and a demand by him for payment for the converted logs, made after part of the logs have been delivered, is sufficient to render the vendee liable in conversion for those delivered after, as well as before, the demand.—ANDERSON V. SUTHERLAND, Wis., 65 N. W. Rep. 865.

28. CORPORATIONS—Disclosure of Condition.—An Ohio corporation has not the right to refuse to make true disclosure of its condition in an action by stockholders

brought under chapter 5, tit. 1, div. 7, Rev. St., to obtain a judgment of dissolution. Hence an order upon officers of a corporation requiring them to file in court an inventory, etc., made in conformity to sections 5652 and 5673, is not an order affecting a substantial right, and is not reviewable on error.—ARMSTRONG v. HERMANCOURT BREWING CO., Ohio, 42 N. E. Rep. 425.

29. CORPORATIONS—Insolvency—Action by Creditor.—Where a receiver has been appointed for an insolvent corporation, a creditor cannot sue to enforce payment of unpaid stock subscriptions, the receiver not having refused to press such claim.—BIG CREEK STONE CO. v. SEWARD, Ind., 42 N. E. Rep. 464.

30. CORPORATION—Insolvent Corporation—Preference of Directors.—Directors who are general creditors of an insolvent corporation cannot, by deed of assignment, prefer themselves over other creditors.—W. P. NOBLE MERCANTILE CO., Utah, 42 Pac. Rep. 869.

31. CORPORATIONS — Liability of Stockholders.—The court has no power to entertain a motion for an order allowing execution against stockholders of a corporation under paragraph 1192, Gen. St. 1889, until the record of the case in which the motion is made shows that the corporate property has been exhausted.—CAREY LUMBER CO. v. NEAL, Kan., 42 Pac. Rep. 925.

32. CORPORATIONS—Officers — Authority to Execute Notes.—One who is the principal business manager both of a firm and a corporation, and is in the habit of signing notes and obligations of the corporation as secretary and treasurer, can bind the corporation by signing its name to a bill or note for the accommodation of such firm, where there is no by-law or order of the corporation designating any person to sign its name.—NATIONAL BANK OF CYNTHIANA v. JOHN G. MATTINGLY & SONS, Ky., 33 S. W. Rep. 415.

33. CORPORATION—Shares of Stock—Payment.—Stock of a corporation may be paid for in property or services.—WOOLFOLK v. JANUARY, Mo., 33 S. W. Rep. 432.

34. CORPORATIONS—Subscriptions to Capital Stock.—Where the object of a corporation, as expressed in the certificate of incorporation, is not illegal, the fact that such corporation afterwards entered upon illegal projects cannot be urged as a defense in an action to recover unpaid subscriptions to the capital stock.—UNITED STATES VINEGAR CO. v. FOEHRENBACH, N. Y., 42 N. E. Rep. 403.

35. CORPORATIONS—Void Resolution—Ratification.—A resolution of a board of directors fixing the salary of the president, and which was spread upon the records, but was illegal because it required the president's vote to adopt it, could be ratified by a subsequent board, so as to justify the president for having drawn such salary.—WICKERSHAM v. CRITTENDEN, Cal., 42 Pac. Rep. 935.

36. CRIMINAL EVIDENCE—Assault.—In a prosecution for assault, where defendant offers evidence to prove that the assaulted person stated that she did not know who committed the assault, the State, to corroborate her testimony, may prove that she stated soon after the assault that defendant was one of the persons who committed the assault.—DUKE v. STATE, Tex., 33 S. W. Rep. 349.

37. CRIMINAL EVIDENCE—Assault—Deadly Weapon.—On a prosecution for aggravated assault with a deadly weapon, where it appears that the weapon was a pistol used as bludgeon, the weight and size of the pistol must be shown to determine whether it is, as so used, a deadly weapon.—BRANCH v. STATE, Tex., 33 S. W. Rep. 356.

38. CRIMINAL EVIDENCE — Homicide. — It appeared that an officer went to the place where deceased's body was being prepared for burial, and there saw the body and a Mexican, and that he asked for deceased's clothes, and the Mexican handed him a bloody shirt and pants, produced in evidence. There was no suggestion that the evidence of such facts was fabricated: Held, that it was not error to permit such officer to testify that a pair of pants handed to him by a Mexican were deceased's, and had in the pocket a knife, which was shut.—KIDWELL v. STATE, Tex., 33 S. W. Rep. 342.

39. CRIMINAL LAW—Appeal.—Where defendant is convicted under an indictment containing two counts, the judgment will not be reversed because of errors committed in instructions submitting the issues on the count on which he was not convicted.—TIGERINA v. STATE, Tex., 33 S. W. Rep. 353.

40. CRIMINAL LAW—Habeas Corpus.—One convicted of murder in the first degree under an indictment in the language of the New Jersey statute, dividing murder into two degrees, and defining them, and providing that the indictment need only charge that defendant did willfully, feloniously, and of his malice aforethought, kill and murder the deceased, the degree of murder charged not being specified, was not denied the equal protection of the laws nor convicted without due process of law.—KOHL v. LEFLBACK, U. S. S. C., 16 S. C. Rep. 304.

41. CRIMINAL LAW—Homicide.—Where it could be inferred from the testimony that deceased was killed by a certain person, in a sudden quarrel, and not in necessary self-defense, and that defendant participated in such killing, or that defendant interfered, without previous design, in the difficulty between deceased and said person, in which deceased was the aggressor, and defendant used more force than was necessary for the protection of said person, and thus slew deceased, a charge on manslaughter should have been given.—MAFFATT v. STATE, Tex., 33 S. W. Rep. 344.

42. CRIMINAL LAW—Homicide — Continuance.—Nine days having elapsed from the time when the witnesses who resided in the county were summoned to the day of the trial, and the trial having continued for three or four days, and no attachment having been issued for said witnesses, defendant was not entitled to a continuance on the ground of their absence, it not appearing when the process was returned, or how far from the county seat the witnesses lived, and as the testimony of such witnesses could not have affected the result.—MITCHELL v. STATE, Tex., 33 S. W. Rep. 367.

43. CRIMINAL LAW—Homicide — Impaneling of Jury.—Defendant, in a murder case, was not entitled to wait until the State should make its challenges and furnish him with its list of jurors, before striking from his list.—VERNON v. STATE, Tex., 33 S. W. Rep. 364.

44. CRIMINAL LAW—Homicide—Instructions.—Where the only issues are manslaughter and accidental homicide, on both of which proper instructions are given, an erroneous charge on self-defense is harmless.—JAMES v. STATE, Tex., 33 S. W. Rep. 342.

45. CRIMINAL LAW—Homicide—Self-defense.—Defendant sought deceased with the avowed and deliberate purpose of killing him if he questioned his conduct in a certain matter, and, on deceased questioning his conduct, he shot him: Held, that defendant could not defend a prosecution therefor on the ground of self-defense because deceased placed his hand on his pistol pocket.—ADAMS v. STATE, Tex., 33 S. W. Rep. 355.

46. CRIMINAL LAW — Homicide — Self-defense.—One who goes into the house of another, with a pistol in hand, and says to him, "I understand you intend to kill me," and then shoots him, cannot avail himself of the plea of self-defense, on the ground that deceased at the time attempted to procure a pistol for the purpose of killing defendant, and defendant so understood his conduct.—HOOVER v. STATE, Tex., 33 S. W. Rep. 337.

47. CRIMINAL LAW — Malicious Exposure of Poison.—An indictment under the statute, direct and certain as to time, place, and the party charged, is ordinarily sufficient, if the offense is described substantially in statutory language, fully apprising the accused of the nature and particular circumstances of the charge against him.—STATE v. ISAACSON, S. Dak., 65 N. W. Rep. 430.

48. CRIMINAL LAW — Perjury — Res Judicata.—Under Code, § 4359, providing that the only pleas to an indictment shall be guilty or not guilty or a plea of former acquittal or conviction, where defendant was indicted for perjury on his trial for larceny, of which he was acquitted, it was proper to strike out a plea setting out what defendant claimed was in issue on the trial for larceny, and averring that the same matters were in issue under the indictment for perjury.—STATE v. CAYWOOD, Iowa, 65 N. W. Rep. 385.

49. CRIMINAL LAW — Right to Copy of Indictment.—Where, after an indictment was presented against defendant, the prosecution procured a second bill, including another person in the charge, on which a *capias* issued under which defendant was arrested, defendant was entitled to a copy of the second bill.—STOKES v. STATE, Tex., 33 S. W. Rep. 350.

50. CRIMINAL PRACTICE—Bribery—Indictment.—Pen. Code, §§ 950, 952, provide that an indictment shall contain a statement of the acts constituting the offense, and must be direct as to the particular circumstances when necessary to constitute a complete offense. Section 7, subd. 6, defines the word "bribe" as anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote, or opinion in any public or official capacity: Held, that an indictment which charged that defendant did "give a bribe" to a certain supervisor, with intent to corruptly influence him in a certain matter, was not sufficient.—PEOPLE v. WARD, Cal., 42 Pac. Rep. 894.

51. CRIMINAL PRACTICE—Embezzlement—Indictment.—Where an indictment charges, under Act March 3, 1875, the embezzlement of a certain sum of money, belonging to the United States, by defendant, a post-office employee, if the words charging defendant with being such an employee are material, it must be averred that the money embezzled came into his hands by virtue of such employment, since otherwise the allegation of employment is meaningless, and may be misleading.—MOORE v. UNITED STATES, U. S. S. C., 16 S. C. Rep. 294.

52. CRIMINAL PRACTICE — Indictment for Perjury.—A count for perjury gave the name of the special examiner of the pension office before whom the alleged false oath was taken, averred that he was competent to administer an oath, and set forth the very words of his statement alleged to have been willfully and corruptly used by the accused, which was, in effect, that defendant had never received any injury to the forefinger of his right hand since his discharge from the army. It further charged that such false statement was part of a deposition given and subscribed by the accused before that officer, and was material to an inquiry then pending before, and within the jurisdiction of, the commissioner of pensions: Held, that the accused was sufficiently informed of the matter for which he was indicted, so as to meet the requirement of Rev. St. § 5396, that the substance of the charge should be set forth.—MARKHAM v. UNITED STATES, U. S. S. C., 16 S. C. Rep. 289.

53. CRIMINAL PRACTICE — Rape — Indictment.—Code Cr. Proc. § 4306, provides that no indictment is insufficient for want of an allegation of the time of any material fact, when the time has been once stated: Held, that where an indictment for rape is in two counts, the first charging that the crime was committed by force, and the second by carnally knowing a female child under 18 years of age, the same female being named in each count, and the date of the commission of the offense being the same in each, except that in the second the year is omitted, the date of the offense is sufficiently shown in the second count, though the State dismisses the first.—STATE v. GASTON, Iowa, 65 N. W. Rep. 415.

54. DEED — Cancellation — Marriage as a Consideration.—Where the consideration of a deed was that the grantee should marry the grantor, and live with him the rest of their joint lives, and they were married and lived as man and wife for a number of years, the husband is not entitled to a reconveyance because the wife refused to live longer with him, though, before the execution of the deed, the wife falsely represented to the husband that she was a woman of chaste character.—BARNES v. BARNES, Cal., 42 Pac. Rep. 904.

55. DESCENT — Rights of Adopted Children.—A child duly adopted is a child capable of inheriting, within Rev. St. 1889, §§ 4518, 4520, providing that the widow may take half her husband's real estate, if he die leaving no child capable of inheriting.—MORAN v. STEWART, Mo., 33 S. W. Rep. 443.

56. ELECTIONS—Ballot Marked by Poll Clerks.—Rev. St. 1894, § 6214, provides that any voter who declares that, through inability to read, he is unable to mark his ballot, may have it prepared by the poll clerks: Held, that where a voter who could not read stated that he could, but asked the poll clerks to prepare his ballot, and they did so, the ballot was properly received.—MONTGOMERY v. OLDHAM, Ind., 42 N. E. Rep. 474.

57. ELECTIONS AND VOTERS—Fusion Ticket—Legality.—Under Act 1891, p. 134, § 4, providing that names of candidates nominated by each party shall be grouped together on the proper ballot, and each group be headed by the name comprising the group were placed in nomination, a person named as a candidate by different political parties is entitled to have his name appear upon the ballot in the group headed by the name of each party.—WILLIAMS v. DALRYMPLE, Mo., 33 S. W. Rep. 447.

58. ESTOPPEL — Married Woman.—Under Rev. St. 1894, § 6962, providing that a married woman shall be bound the same as any other person by an estoppel in *pais*, a statement by a married woman that her note is all right, and that she has no defenses thereto, and that she will pay it, will estop her from claiming, as defenses to an action on it by one who purchased it relying on her statement, that it was given for the debt of a third person, and was without consideration.—STEPHENSON v. CLAYTON, Ind., 42 N. E. Rep. 491.

59. ESTOPPEL AGAINST MARRIED WOMEN.—Where a wife purchases a retail drug store with her separate property, and permits her husband to carry on the business in his own name, she is not estopped, there being no allegation of her insolvency, as against a person selling goods to the husband on the faith of his ownership of the store, to deny the authority of the husband to subsequently mortgage the goods to secure the price, though, after the goods were bought, she may have stated to the sellers that they belonged to her husband.—KIEFER v. KLINSICK, Ind., 42 N. E. Rep. 447.

60. EVIDENCE — Custom and Usage.—Testimony of witnesses that, when they ordered a "car load" of meat from a certain town, they received 20,000 pounds, their order though, generally specifying the number of pounds to be shipped, is insufficient to disprove the existence of a custom in such city, directly testified to by several witnesses, that a car load consisted of 25,000 pounds.—WOLDERT v. ARLEDGE, Tex., 33 S. W. Rep. 372.

61. EVIDENCE—Letters in Possession of Non-resident.—Where a person without the State refuses to permit letters written to her by defendant to be attached to her deposition, secondary evidence of the contents of such letters is admissible.—BULLIS v. EASTON, Iowa, 65 N. W. Rep. 395.

62. EVIDENCE — Relevancy — Admissions.—In an action for false representations, by the owner of land, as to the amount of lumber thereon, whereby plaintiff was induced to enter into a contract for cutting the same, evidence of similar statements by defendant to third persons as to the quantity of lumber on the land, made both before and after plaintiff entered into the contract, is inadmissible against him.—HUGANIR v. COTTER, Wis., 65 N. W. Rep. 364.

68. EXECUTION SALE—Rights of Purchaser.—Under Rev. Stat. 1894, § 781 (Rev. St. 1881, § 769), providing that any person having an undivided interest in land sold under execution may redeem from the sale, and shall have a lien on the several shares of the other owners for their respective shares of the redemption money, where, after a sale of a husband's land under a judgment, it is sold under a prior mortgage given by the judgment debtor and his wife to secure his debt, and is redeemed by the wife on foreclosure, the interest in the land acquired by the purchaser at the judgment sale is chargeable with the full amount paid by the wife to redeem.—UNION NAT. BANK v. MCCONAHA, Ind., 42 N. E. Rep. 495.

64. FEDERAL COURT—Diverse Citizenship.—The privilege of a grantee or purchaser of property, who is a citizen of one State, to invoke the jurisdiction of a federal circuit court to protect his rights as against a citizen of another State, cannot be affected or impaired merely because of the motive that induced his grantor to convey, or his vendor to sell and deliver, the property, provided such conveyance, or such sale and delivery, was a real transaction by which the title passed without the grantor or vendor reserving, or having any right or power to compel or require, a reconveyance or return to him of the property in question.—LEHIGH MIN. & MFG. CO. v. KELLY, U. S. S. C., 16 S. C. Rep. 307.

65. FORECLOSURE — Redemption — Limitations.—The time within which a mortgagor may bring an action to redeem from the mortgagee in possession begins to run from the time the mortgagee goes into possession. The limitation upon suits to redeem, adopted by analogy, is the time within which an action to foreclose may be brought.—BRADLEY v. NORRIS, Minn., 65 N. W. Rep. 357.

66. FRAUDULENT CONVEYANCES—Action to Set Aside.—A purchaser of land at an execution sale may sue to set aside a prior deed of the land made in fraud of the judgment creditor's claim.—FULLER v. PINSON, Ky., 33 S. W. Rep. 399.

67. FRAUDULENT CONVEYANCES—Evidence.—Though defendants procured, by fraud, certain property which was afterwards transferred in trust for a certain creditor, the mere false statement by said creditor as to the financial standing of defendants, made to one who sold goods to defendants by reason thereof, had no tendency to show that the debt in favor of said creditor was not *bona fide*, or that the trust deed was the result of a conspiracy to defraud the general creditors of defendants. STOKES v. BURNS, Mo., 33 S. W. Rep. 460.

68. FRAUDULENT CONVEYANCES—Husband and Wife.—Indebtedness of a husband to his wife is not shown, as against his creditors, by the fact that at the time of their marriage, when the common law, in respect to property rights of husband and wife, was in force, she had certain live stock which went into his possession, and that at various times during the twenty-four succeeding years, according to their testimony, she claimed the proceeds of the property and its increase, and he promised to account therefor some time, he having dealt with it as his own and used the proceeds, and no account having been kept with respect to it.—COLUMBIA SAV. BANK v. WINN, Mo., 33 S. W. Rep. 457.

69. GARNISHMENT—Extent of Garnishee's Liability.—Proceedings in garnishment do not change the legal relations and rights existing between the defendant and the garnishee, nor place the plaintiff in a more favorable position, for the enforcement of a claim against the garnishee, than would be the defendant in an action brought by him for the same cause; nor can one be held in such proceedings to the payment of a liability which the defendant could not himself enforce because of existing equities and set-offs.—KANSAS INV. CO. v. JONES, Kan., 42 Pac. Rep. 935.

70. GARNISHMENT — Property Liable.—Garnishment proceedings bind only such property, money and credits, not exempt by law from execution, as belong to the defendant, and in the possession of the garnishee, or owed by him at the time of the service of process upon the garnishee.—BRADLEY v. BYERLEY, Kan., 42 Pac. Rep. 980.

71. HABEAS CORPUS—Jurisdiction—Adoption.—When, in a proper proceeding under the statute, it reasonably appears to the satisfaction of the judge of the county court that for a period of one year a mother has abandoned her illegitimate child, an order of adoption may be made without the consent and against the objection of such mother.—RICHARDS v. MATTESON, S. Dak., 65 N. W. Rep. 428.

72. HABEAS CORPUS—Person in Custody of State Officers.—Where a person is in custody under process from a State court of original jurisdiction for an alleged offense against the State laws, and it is claimed that he is restrained of his liberty in violation of the United States constitution, the circuit court has a discretion whether it will discharge him upon *habeas corpus* in advance of his trial in the State court; that discretion, however, to be subordinated to any special circumstances requiring immediate action.—WHITTEN v. TOMLINSON, U. S. S. C., 16 S. C. Rep. 297.

73. HOMESTEAD—Increase in Value.—Rev. St. 1889, § 5436, provides that when an execution is levied on land of a housekeeper of which his homestead is a part, he may designate the part thereof which he claims as a homestead, and that the boundaries thereof shall be fixed by appraisers, and the balance levied on under the execution. Section 5435 provides that a homestead shall be exempt from an execution for a debt accruing after it is set apart. Section 5442 provides that when a housekeeper acquires a new homestead from the proceeds of a former one, the new homestead shall be exempt from all the debts from which the former was exempt: Held, that where, after a homestead has been set apart to a housekeeper, a judgment is recovered against him, and he sells the homestead for a sum in excess of the amount fixed by statute as the value of a homestead, the judgment creditor cannot subject the excess of the land in the hands of the vendee to the payment of the judgment.—MACKE v. BYRD, Mo., 33 S. W. Rep. 448.

74. HOMESTEAD—Sale on Execution.—A purchaser of a homestead at execution sale acquires no title thereby.—RATLIFF v. GRAVES, Mo., 33 S. W. Rep. 450.

75. HUSBAND AND WIFE—Community Property—Administration.—On the death of husband and wife, a joint administration on their community estate, against which there are valid claims, may properly be granted.—STEPHENSON v. MARSALIS, Tex., 33 S. W. Rep. 383.

76. HUSBAND AND WIFE—Estate by Entirety.—A married woman, authorized to dispose of her property as a *feme sole*, may convey her interest in an estate by entirety, subject to the right of survivorship in the husband.—BRANCH v. POLK, Ark., 33 S. W. Rep. 424.

77. INJUNCTION—Bond—Counsel Fees.—Counsel fees and costs incurred upon an order to show cause why a restraining order should not be continued, and upon a subsequent unsuccessful motion to dissolve the injunction, and for the preparation and defense of the main action, cannot be recovered in an action on a bond conditioned to pay such damages as might be sustained by reason of the injunction, though the action was eventually dismissed.—CURTISS v. BACHMAN, Cal., 42 Pac. Rep. 910.

78. INTOXICATING LIQUORS—Illegal Sale—Burden of Proof.—On a trial for selling spirituous liquors without a license the burden is on defendant, after it is proved that he sold such liquors, to show that he first obtained a license.—LUCIA v. STATE, Tex., 33 S. W. Rep. 358.

79. INTOXICATING LIQUORS—Unlawful Sales.—On a prosecution for selling intoxicating liquors without a State or county license, the paying of an internal revenue tax to the United States for selling liquor may be shown by a copy of entries from a book kept in the internal revenue office, which, under the internal reve-

nue laws, is required to show the names of persons who have paid such tax.—GERSTEMAN v. STATE, Tex., 33 S. W. Rep. 357.

80. JUDGMENT—Process—Non-residents.—Service on a non resident out of the State will not support a personal judgment.—PORTER v. HILL COUNTY, Tex., 33 S. W. Rep. 384.

81. JUDICIAL SALE—Collateral Attack.—A judgment of a probate court confirming a sale of land by an executor cannot be attacked collaterally by evidence outside the record tending to show that the sale was not made at the place required by law.—CRAWFORD v. MCDONALD, Tex., 33 S. W. Rep. 325.

82. LANDLORD AND TENANT—Estoppel to Deny Landlord's Title.—In an action for possession defendant cannot show that the only title plaintiff had when he made the lease was under a tax deed, and that, after the expiration of the lease, defendant attorned to one claiming superior title to plaintiff, where the lease was not procured by fraud, and defendant never surrendered possession, and defendant's possession was never disturbed, and there had been no change in plaintiff's title since the lease was made.—PENCE v. WILLIAMS, Ind., 42 N. E. Rep. 494.

83. LIMITATION OF ACTIONS—Judgment.—On the creation of one township from a portion of another, limitations do not begin to run against the liability of the new township to pay its portion of bonds issued by the old township, prior to the division, until the liability of the old township thereon has been established by judgment, the bonds being only valid in the hands of *bona fide* holders.—TOWNSHIP OF GRANT v. TOWNSHIP OF RENO, Mich., 65 N. W. Rep. 376.

84. MARRIED WOMAN—Separate Property.—As under Civ. Code, § 162, realty acquired as a gift by a married woman remains her separate property, the filing of a declaration of homestead for the benefit of herself and husband, even if it transmuted the title into a joint tenancy, did not preclude the wife from maintaining in her own name an action to quiet title.—PREY v. STANLEY, Cal., 42 Pac. Rep. 908.

85. MASTER AND SERVANT—Assumption of Risk.—Deceased and three others having been set to work, in the presence of a foreman, in removing guard rails, which weighed about 400 pounds, from a railroad bridge, and one of the others having stumbled, whereby the whole weight of one end of the rail was thrown upon deceased, causing him to fall from the bridge, the questions of defendant's negligence in doing the work in the manner in which it was done, and of deceased's assumption of the risk, should have been submitted to the jury.—BONNETT v. GALVESTON, H. & S. A. RY. CO., Tex., 33 S. W. Rep. 334.

86. MASTER AND SERVANT — Assumption of Risks.—While the rule is general that the servant takes upon himself the risks necessarily incident to his employment, still, if the employer has knowledge of some latent hazard which the servant does not know, and which, with proper diligence or reasonable observation, he would not know, he ought not to be held to have assumed such concealed hazard.—CARLSON v. SIOUX FALLS WATER CO., S. Dak., 65 N. W. Rep. 419.

87. MASTER AND SERVANT—Assumption of Risk—Care Required of Minor.—A boy of 16 years must exercise only such care as boys of his age, intelligence, and experience usually use under similar circumstances.—KUCERA v. MERRILL LUMBER CO., Wis., 65 N. W. Rep. 374.

88. MASTER AND SERVANT—Contract of Employment.—A contract for services at a specified rate per year, not specifying any time of employment, is not a contract for a year, but one to pay for services actually rendered at the specified rate, determinable at the will of either party.—MARTIN v. NEW YORK LIFE INS. CO., N. Y., 42 N. E. Rep. 416.

89. MASTER AND SERVANT—Negligence—Fellow-servants.—Under Laws 1893, p. 120, providing that, in order to be fellow-servants, employees must be in the common service, in the same department, of the same grade, working together at the same time and place, to a common purpose, an engineer of a road locomotive, who was under the control of the train master, is not a fellow-servant with employees in the yard, who were under the supervision of the yard master, unless in the performance of his duties he became temporarily subject to the yard master while operating in the yard, but he was not then a fellow-servant with the yard master himself.—SAN ANTONIO & A. P. RY. CO. v. HARDING, Tex., 33 S. W. Rep. 273.

90. MECHANIC'S LIEN—Assignment.—A mere right to assert a mechanic's lien is not assignable.—BAUER v. FAY, Cal., 42 Pac. Rep. 902.

91. MORTGAGE—Foreclosure—Priorities.—Where the vendor of real estate agreed with the vendee to take a mortgage on the premises sold to secure a deferred payment of the purchase money, subject to a mortgage for a definite sum, bearing interest at a stipulated rate, to be executed by the vendee in favor of a loan company for a loan of money, the terms of which agreement were known to the loan company, such vendor has a right to demand, upon a foreclosure of the mortgages taken pursuant to said agreement, and a sale of the mortgaged premises before the time specified for the maturity of the first mortgage, that the proceeds of the sale be not applied to the first mortgage debt to an amount greater than the agreed amount of the loan, with the stipulated rate of interest thereon up to the time when the proceeds of the sale shall be distributed.—NEW ENGLAND LOAN & TRUST CO. v. WOOD, Kan., 42 Pac. Rep. 940.

92. MORTGAGE FORECLOSURE—Redemption by Junior Mortgagee.—Where a junior mortgagee, whose mortgage was recorded, was not made a party to an action to foreclose the senior mortgage, the fact that, after the foreclosure sale, and before the expiration of the statutory time to redeem therefrom, he bought the land at a sale under foreclosure of his own mortgage, for the full amount of his foreclosure judgment, does not preclude him from suing in equity to redeem from the sale under the senior mortgage.—MCCORMICK HARVESTING CO. v. LLEWELLYN, Iowa, 65 N. W. Rep. 412.

93. MUNICIPAL CORPORATIONS — Alteration of Highways.—Since Rev. St. art. 375, gives to cities incorporated under general laws exclusive control of streets, private citizens cannot enjoin the alteration of a highway on the ground that it will injure their property and business, and inconvenience a portion of the public; the proposed change not depriving plaintiffs of ingress to and egress from their land, which does not abut on the street to be altered.—WOOTTERS v. CITY OF CROCKETT, Tex., 33 S. W. Rep. 391.

94. MUNICIPAL CORPORATIONS—Damages from Fire—Waterworks.—The power conferred upon incorporated villages to establish and maintain systems of waterworks is of a public and governmental nature, though water rents are paid by the people, and hence such municipalities are not liable for loss of property by fire, owing to the defective condition of the waterworks.—SPRINGFIELD FIRE & MARINE INS. CO. v. VILLAGE OF KEESEVILLE, N. Y., 42 N. E. Rep. 405.

95. MUNICIPAL CORPORATIONS—Limitation of Power to Create Debt.—As Const. art. 11, declares that no debt shall be created by any city, unless at the same time provision be made for its payment, one claiming compensation under a contract with the city must show that the obligation was to be satisfied out of the current revenues, or out of some fund within the immediate control of the city, and was not, therefore, a debt within the constitution, or he must prove compliance with the constitutional provision as to the payment thereof.—MCNEILL v. CITY OF WACO, Tex., 33 S. W. Rep. 322.

96. MUNICIPAL CORPORATIONS — Negligence—Defective Sidewalks.—That a city permitted a depression 13 inches deep, 7 inches wide, and 2 feet 6 inches in length, to remain for years in the center of a flag sidewalk, i

feet wide, it not appearing that any accident had theretofore happened to pedestrians therefrom, as a matter of law does not render the city liable for injuries to a pedestrian, who is thrown by stepping into the depression.—BELTZ v. CITY OF YONKERS, N. Y., 42 N. E. Rep. 401.

97. NEGLIGENCE — Defective Highways — Town.—A person who has notice of a defective, unsafe or dangerous condition of a bridge, culvert, or public highway is not necessarily negligent in using the same if he does so in a careful, prudent manner.—FALLS TP. OF CHASE COUNTY v. STEWART, Kan., 42 Pac. Rep. 926.

98. NEGOTIABLE INSTRUMENT—Action on Note—Defenses.—Want of authority in a national bank to purchase a negotiable note cannot be used by the maker of the note as a defense in an action upon it.—FIRST NAT. BANK OF PIERRE v. SMITH, S. Dak., 65 N. W. Rep. 437.

99. NEGOTIABLE INSTRUMENT—Material Alteration of Note.—Where a note provided that the makers, indorsers, and guarantors waived presentment of payment, notice of non-payment, protest, notice of protest, and due diligence in bringing suit, it was not a material alteration thereof to write over the blank indorsement of the payee, "Payment guarantied." — IOWA VALLEY STATE BANK v. SIGSTAD, Iowa, 65 N. W. Rep. 407.

100. NEGOTIABLE INSTRUMENT — Promissory Notes—Irregular Indorsers.—The obligation of "irregular indorsers" of a promissory note, who are liable as original promisors or makers, is joint and several, and not joint, with the obligation of the makers who sign their names at the foot of the note, although the instrument is in form in other respects joint.—SCHULTZ v. HOWARD, Minn., 65 N. W. Rep. 363.

101. NEGOTIABLE INSTRUMENT—Stipulation for Attorney's Fees.—Sec. 1, ch. 16, Laws, 1889, providing "that any provision contained in any note, bond, mortgage or other evidence of debt for the payment of an attorney fee in case of default in payment or of proceedings had to collect such note, bond or evidence of debt or to foreclose such mortgage is hereby declared to be against public policy and void," a stipulation for attorney's fee in an otherwise negotiable note cannot have the effect of destroying its negotiability.—CHANDLER v. KENNEDY, S. Dak., 65 N. W. Rep. 439.

102. PARTNERSHIP—Books of Account—Evidence.—In an action against a partner individually on a partnership transaction, after the partnership has ceased to do business, the fact that the books of account were taken by another partner, and are in another State, will not render secondary evidence of their contents admissible, where the only evidence of diligence to procure the books shown is that inquiries made two years, and again a few days prior to the trial failed to show the whereabouts of such partner.—WAITE v. HIGH, Iowa, 65 N. W. Rep. 397.

103. PARTNERSHIP — Settlement.—On the settlement of a partnership, one partner cannot object to a correction of a clerical mistake whereby another partner, who put in goods as stock of the firm, was not credited with the full value of the goods, due to the fact that two pages of the book in which the goods were invoiced were omitted in footing up their value.—WOLF v. LEVI, Ky., 33 S. W. Rep. 418.

104. PEDDLER'S LICENSE—Interstate Commerce.—On a trial for peddling without a license, in violation of an ordinance, it appeared that a firm doing business from New York, through the various States, had a general agent and distributing agents in the State, of whom defendant was one. The distributing agents sent their orders to the general agent, who forwarded them to New York, and received the goods from there. He repacked and sent them to the distributing agents, who delivered them to their customers: Held, that defendant was engaged in interstate commerce, and was not subject to the ordinance.—CITY OF HUNTINGTON v. MAHAN, Ind., 42 N. E. Rep. 463.

105. PLEADING—Action against Firm.—When, in an action against the defendants as partners, the partnership, the names of the members composing the same, and the partnership name are fully set out in the body of the complaint, the omission in the title of such complaint of the statement that such defendants are partners, and constitute a firm, does not render the complaint subject to the objection that the same does not state facts sufficient to constitute a cause of action. —VAN BRUNT & DAVIS CO. v. HARRIGAN, S. Dak., 65 N. W. Rep. 421.

106. PRINCIPAL AND AGENT—Evidence.—An agency cannot be shown by declarations of the agent alone.—WHITAM v. DUBUQUE & S. C. R. Co., Iowa, 65 N. W. Rep. 403.

107. PRINCIPAL AND AGENT—Evidence.—On an issue as to whether defendant's wife purchased goods from plaintiff on her husband's account, or on the credit and for the use of a sanitarium company of which he was manager, plaintiff may show that, at about the same time, defendant and his wife bought goods from other persons, for the use of the sanitarium, in defendant's name and on his own credit.—MOORE v. SCHRADER, Ind., 42 N. E. Rep. 490.

108. PRINCIPAL AND SURETY — Note — Signature by Mark.—St. § 482, providing that a person who cannot write shall not be bound as surety by the act of an agent unless the agent's authority is in writing, signed by the principal's mark, in the presence of one credible witness, does not apply to a surety who signed a note by making his mark, his name being written by the witness to his signature.—STAPLES v. BEDFORD LOAN & DEPOSIT BANK, Ky., 33 S. W. Rep. 403.

109. RAILROAD COMPANIES—Accident—Negligence.—While a failure on the part of those in charge of a locomotive to give the statutory signals constitutes negligence *per se* on the part of the railway company, such failure does not render the company liable for injuries received at a common country crossing, if the traveler injured contributed thereto by omitting to look and listen.—JUDSON v. GREAT NORTHERN RY. CO., Minn., 65 N. W. Rep. 447.

110. RAILROAD COMPANIES—Complaint Showing Contributory Negligence.—A complaint in an action for injuries caused by failure of defendant to stop its train at a station long enough for plaintiff to alight, which alleges that plaintiff was acquainted with the station, and knew that the platform was twenty-six inches below the car steps, and that trainmen always assisted women to alight; that she saw that the train was moving before she left the car; that on reaching the platform, seeing that the train was moving faster and no one to assist her, she was seized with fear that she would be carried past her station, and proceeded down the steps, and was thrown off, is demurrable as showing contributory negligence.—TOLEDO, ST. L. & K. C. R. Co. v. WINGATE, Ind., 42 N. E. Rep. 477.

111. RAILROAD COMPANIES—Ejection of Passenger.—A judgment for $750 for the wrongful ejectment of a passenger from a train on a rainy day, more than a mile from any house, and three or four miles from a station, is excessive, in the absence of any ground for substantial damages other than physical and mental suffering, or any facts entitling him to exemplary damages.—GILLAN v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO., Wis., 65 N. W. Rep. 373.

112. RAILROAD COMPANIES—Injuries to Passenger—Contributory Negligence.—Where a passenger, after the conductor calls out the name of his station, and says "all out for" such station, gets off the train several hundred yards before it reaches the depot, and while running at a high rate of speed, he is guilty of such negligence as precludes a recovery for injuries received.—LOUISVILLE & N. R. Co. v. DEPP, Ky., 33 S. W. Rep. 417.

113. RAILROAD COMPANIES—Injury to Stock—Averment of Jurisdictional Facts.—In an action against a railroad company for killing a horse, a complaint

which alleges that plaintiff's farm is situated in H county, where the action is brought, and that the animal entered upon a neighbor's land, and thence to defendant's unfenced track, where it was killed, is defective, since it does not show that the horse was killed in H county.—CHICAGO & S. E. RY. CO. v. WHEELER, Ind., 42 N. E. Rep. 489.

114. RAILROAD COMPANIES—Negligence—Evidence.—Where a train is running through a populous neighborhood, just outside the city limits, where laborers have for years been accustomed to use the tracks in going to their work, and the employees on the train see, or by the exercise of ordinary care may see, a person on the track in time to avoid a collision, but fail to use such care, the company will be liable, though the person injured is guilty of contributory negligence.—CHAMBERLAIN v. MISSOURI PAC. RY. CO., Mo., 33 S. W. Rep. 437.

115. RAILROAD COMPANIES—Street Railway Accident—Negligence.—Where plaintiff was standing between street railway tracks, awaiting an approaching car, and without looking stepped backward upon the other track, within ten or fifteen feet of a car going in the opposite direction, she was guilty of contributory negligence, as a matter of law.—BAILEY v. MARKET STREET CABLE RY. CO., Cal., 42 Pac. Rep. 914.

116. RECEIVERS—Contracts—Approval by Court.—A person engaged by the receiver of a railroad as general solicitor, at a stipulated annual salary, who seeks, in a court other than that by which the receiver was appointed, to enforce against the corporate property a claim for compensation under such contract, must show that his claim was authorized or approved by the court which had control of the receivership, though he had received compensation under the contract from time to time from the receiver.—INTERNATIONAL & G. N. R. CO. v. HERNDON, Tex., 33 S. W. Rep. 377.

117. REPLEVIN OF SECURITIES—Judgment.—A judgment in replevin by a vendor enforcing against the property sold the special interest reserved therein by him, as security for notes, to the full amount of the unpaid price, is not, till satisfied, a bar to an action on one of the notes.—HYLAND v. BOHN MFG. CO., Wis., 65 N. W. Rep. 369.

118. SALE—Undue Influence — Action for Damages.—An action for damages for procuring a sale by undue influence will not lie where plaintiff made no offer to rescind under Civ. Code, § 1566, when freed from the undue influence, and knew at the time of the sale the facts constituting the undue influence.—BANCROFT v. BANCROFT, Cal., 42 Pac. Rep. 896.

119. SLANDER OF FEMALE.—On a trial for slandering a female, proof of words of the same or similar import as those alleged in the indictment is insufficient, but the language charged must be proved.—BARNETT v. STATE, Tex., 33 S. W. Rep. 340.

120. SPECIFIC PERFORMANCE — Equitable Relief.—Though defendant's wife did not join in a contract to convey, it was proper, in a suit for specific performance, to protect plaintiffs against the inchoate rights of defendant's wife in the land, under a general prayer for equitable relief.—HESSION v. LINASTRUTH, Iowa, 65 N. W. Rep. 399.

121. SUBROGATION TO RIGHTS OF JUDGMENT CREDITORS.—A junior judgment creditor purchased, at an invalid sale on an execution issued on his judgment, land of the judgment debtor, which was also sold under an execution issued on a senior judgment. Pending an appeal by the execution debtor, in an action to set aside the deed issued to the junior judgment creditor, the latter redeemed from the sale under the senior judgment: Held that, on the sale under the junior judgment being declared invalid, the junior judgment creditor was subrogated to the rights of a redeeming creditor under the sale on the senior judgment.—MILBURN v. PHILLIPS, Ind., 42 N. E. Rep. 461.

122. TAXATION — Assessment — Validity.—Where assessments are relatively equal, but at much less than the true value of the property, the board of review cannot increase the valuation of the property of one taxpayer without increasing in proportion the valuation of the property of the other taxpayers.—HIXON v. TOWN OF EAGLE RIVER, Wis., 65 N. W. Rep. 366.

123. TAXATION—Sales — Redemption.—Under Rev. St. 1894, § 8611, providing that an insane person may redeem from a tax sale within two years after the expiration of such disability, in an action by the guardian of an insane person during his life to recover possession of land illegally sold for taxes, the court cannot order a sale of the land to satisfy the purchaser's tax lien.—WAGNER v. STEWART, Ind., 42 N. E. Rep. 469.

124. TAXATION OF BANK STOCK.—The shares of stock of an incorporated banking association being, as provided by chapter 14, Laws 1891, assessed against the individual owners thereof, and the tax extended thereon being against and payable by such individual shareholders, and not by the bank, such bank cannot, in its own name, and for itself, maintain an action to restrain the collection of such tax from the individual stock owners.—NORTHWESTERN LOAN & BANKING CO. v. MUGGLI, S. Dak., 65 N. W. Rep. 442.

125. TOWNS—Claims against.—Sections 790-796, Comp. Laws, constituting the town supervisors an auditing board, and prescribing how accounts payable by the town may be presented, audited, and allowed, do not make the presentation of claims against the town to such board, for audit, a condition precedent to the bringing of action thereon.—SHORT v. CIVIL TOWNSHIP OF WHITE LAKE, S. Dak., 65 N. W. Rep. 432.

126. TRIAL — Special Verdict—Conflict with General Verdict.—A general verdict, finding, in effect, that a freight brakeman was expressly authorized to eject trespassers from trains, was in irreconcilable conflict with a special verdict finding that defendant had in force a rule providing that brakemen were under immediate orders of the conductor with whom they served, and, in general, were the servants and guardians of the train, to do all the work required during its trip, and to protect it from danger, as (the construction of that rule being for the court) it did not confer express authority to eject a trespasser, and there was no other finding to sustain such authority.—LAKE SHORE & M. S. RY. CO. v. PETERSON, Ind., 42 N. E. Rep. 480.

127. WATERS—Irrigation—Diversion of Water.—In an action to restrain the wrongful diversion of water, and for damages for past diversion, where the complaint alleges plaintiff's prior appropriation, defendant's diversion, and the amount of damages thereby occasioned, and the answer consists simply of denials and an allegation of appropriation by defendant, a finding that plaintiff's manner of using the water has been wasteful, and that all or a part of his damage has been occasioned thereby, is within the issues.—ROEDER v. STEIN, Nev., 42 Pac. Rep. 867.

128. WILLS—Construction.—Testator devised all his land to his wife for life, and later in the will, after devising certain land to other relatives to take effect on the wife's death, gave the remainder of the land to his wife, to dispose of as she might choose at her death: Held that, by the last clause, the wife took a fee in the remainder of the land.—BYRNE v. WELLER, Ark., 33 S. W. Rep. 421.

129. WILLS — Construction — Parol Evidence.—Parol evidence is admissible to identify "my life insurance policy, amounting to $1,000," which testator ordered to be paid to his executor to carry out the provisions of the will.—HARTWIG v. SCHIFFER, Ind., 42 N. E. Rep. 471.

130. WITNESS—Privileged Communications—Waiver.—Where a patient, who has been attended by two physicians at the same consultation in regard to injuries received by her in an accident, calls one of the physicians to testify in regard to the nature of the injuries, she waives thereby her right to demand that the other physicians shall not also testify.—MORRIS v. NEW YORK, O. & W. RY. CO., N. Y., 42 N. E. Rep. 410.